Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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NO. 84-1123

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ARMOUR & COMPANY,

Petitioner,

v.

CURTIS HOLSLY, JACKIE DRAKEFORD, JULIUS FRAZIER, MYNELL BENNETT, JANNIE HILL, LAURA HARVEY, LINWOOD EDWARDS, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the district court abuse its "judicial administration" discretion under Cooper v. Federal Reserve Bank, ___ U.S. ____ (1984), in ruling on claims fully litigated at trial?

2. Did the district court abuse its discretion in certifying the class?

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Statement of the Case

On March 4, 1977 Curtis Holsey, Jackie Drakeford and Julius Frazier instituted this action against Armour & Company and the United Food and Commercial Workers International Union alleging that Armour and the Union had engaged in certain racially discriminatory employment practices affecting the plaintiffs and a class of employees and applicants for employment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. and 42 U.S.C. §1981.[1/] Holsey, Frazier and Drakeford had previously filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC) on March 7, 1974. On June 2, 1977, Mynell Bennett was allowed to intervene in the proceeding as a named plaintiff, following receipt of a right to sue letter based

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1/ The claims against the union were dismissed and are not at issue here.

on an EEOC charge she had filed on January 27, 1972. Bennett's charge alleged and the EEOC stated, among other conclusions, that the Company maintained segregated job classifications in failing to hire or promote blacks into numerous supervisory and sales jobs. (A. 110, 169-70)

On May 1, 1979, the district court conditionally certified the class to include black applicants for employment and employees at petitioner's Mecklenburg, North Carolina facility who had been affected by certain discriminatory employment practices. (A. 162) At trial plaintiffs presented evidence that they and their class, as well as intervenor Bennett and plaintiff class members Harvey, Hill and Edwards, had personally suffered from defendant's pattern of discrimination in promotions to supervisory or sales jobs, and that Armour had harassed and retaliated against complaining black employees.

Armour had ample opportunity to put on whatever evidence it saw fit to rebut these claims, and introduced testimonial and documentary evidence opposing the contentions of each of the seven individual claimants. (A. 228) At no time prior to the district court's ruling on the merits of the individual claims did Armour raise any objection to the lower court's adjudication of all litigated claims.

After trial, but before Judgment, the district court allowed the three plaintiff class members to formally intervene as named representatives. Subsequently, the district court entered its Findings of Fact and Conclusions of Law. (A. 1-97)

On appeal, a divided panel of the Fourth Circuit vacated the judgment and remanded for reconsideration of the findings of fact and conclusions

of law, and to consider the intervening decision of Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). While the case was pending in the district court, General Telephone Co. v. Falcon, 457 U.S. 147 (1982), was issued. The district court thereupon modified the class definition but otherwise substantially reaffirmed its earlier findings of discrimination.

The district court found that the Company had discriminatorily denied Holsey and Frazier bumping rights in layoffs of hourly laborers. The Court also found that Drakeford and Harvey were discriminatorily denied promotion to sales jobs; that Drakeford, Edwards and Harvey were discriminatorily denied promotion to foremen jobs; and that Bennett was denied appointment or promotion to a permanent job because of retaliation and race. The lower court cited

numerous instances in which plaintiffs and class members had been harassed and retaliated against because of their complaints about discrimination. The district court concluded that Armour had engaged in a pattern and practice of discriminatorily refusing blacks promotions to sales and supervisory jobs, and had engaged in a "consistent practice" of retaliating against blacks who complained. (A. 189) The district court also found that more than 40 to 60 black employees annually had been affected by the pattern of discrimination. (A. 163) For example, although employing more than 100 persons in sales or supervisory capacities between 1965 and 1977, the district court found that the Company failed to hire a single black in those jobs until August 1, 1977. (A. 150, 153) Harvey was told not to bother applying because the Company did not hire blacks

in sales. (A. 147) When minorities protested discrimination, the Company consistently retaliated against them, going so far as deny one employee his right to file a grievance, and threatening him that if he went to the EEOC he'd "better win." (A. 12-13; Tr. 365)

From these findings, Armour appealed a second time, and a unanimous panel of the Fourth Circuit affirmed in substantial part. (A. 217-84) However, the panel modified the promotion class in light of Falcon to exclude nonemployee applicants, and positions other than sales or supervisory slots. (A. 272-75) The court of appeals further concluded that petitioner had "full opportunity" to defend the individual claims, and had not demonstrated any prejudice from the post-trial intervention of the testifying class members. (A. 227-29)

REASONS FOR DENYING THE WRIT

This case involves the routine exercise by a district court of its judicial administration and fact-finding functions, and the familiar application of this Court's precedents. The petitioner raises issues which have not been properly presented to the lower courts. Moreover, the issues raised involve no conflicts with decisions of this Court or other courts of appeal. Therefore review by this Court is unwarranted.

I. The Lower Courts' Decision Refusing Petitioner's Request to Relitigate Claims That Had Been Fully Litigated at Trial is Consistent With Cooper v. Federal Reserve Bank.

Petitioner's argument that the lower courts erred in adjudicating the plaintiffs' and the three intervenors' claims that were fully litigated ignores this Court's decision in Cooper v. Federal Reserve Bank, ___U.S.___, 104 S.Ct. 2794 (1984). Cooper held that "[w]hether the

issues framed by the named plaintiffs before the [trial] court should be expanded to encompass the individual claims of additional class members is a matter of judicial administration that should be decided in the first instance by the district court." 104 S.Ct. at 2802. (emphasis added)

Here, in exercising its administrative discretion the district court held full hearings on the three plaintiff class members' claims, as well as the claims of the named plaintiffs and intervenor. As noted by the appeals court, petitioner was aware of these claims, had "full opportunity" to present rebuttal evidence, and in fact "introduced evidence in opposition to them." (A. 228) At no point has Armour claimed it had additional evidence to present on the individuals' claims. Moreover, petitioner registered no objection at trial to this procedure, nor at any time until after

the lower court issued its ruling on the merits of the claims. Indeed, as noted by the court below (A. 228), it is difficult to see how petitioner was harmed since plaintiffs met the more rigorous Burdine burden of proof than that required in Stage II proceedings pursuant to United States v. Teamsters, 431 U.S. 324 (1977) in which defendant bears the burden of proof.

In summary, petitioner had full opportunity to defend against the claims, it failed to object prior to decision on the merits to the procedure followed by the district court; no conflict among any circuits has been shown;[2/] and the lower courts'

2/ Petitioner cites another decision from the same circuit as the opinion below, Sledge v. J.P. Stevens, 585 F.2d 625 (4th Cir. 1978), which the appeals court distinguished. The court of appeals concluded that Sledge is not in conflict, since Sledge dealt with a class member who "was led to believe that he would [not] be expected

(Footnote 2 continued)

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decision falls squarely within Cooper's holding concerning a district court's ministerial function.

II. The Class Certification Issues Do Not Warrant Review.

The class certification issues raised by petitioner involved a fact-intensive investigation by the district court into the nature of the claims. Both lower courts modified the class definition in compliance with Falcon's guidelines, and petitioner has shown no conflict with decisions of other courts of appeals. One of petitioner's issues was not even timely presented to the lower courts.

2/(cont'd) to prove" his case until a later stage of the proceeding. 585 F.2d at 637-38. (See A. 229) In contrast, petitioner here "had a full opportunity to defend against the intervenors' claims, and it introduced evidence in opposition to them." (A. 228)

Review of the district courts' findings of fact regarding numerosity is unwarranted. The district court found that [m]ore than forty to sixty black employees of the Company annually . . . have been affected by the Company's practices" (A. 163 (emphasis added)) during the nine years prior to trial. While there exists some overlap from year to year, the lower courts found as a fact that joinder of such large numbers of employees was impractical. As petitioner has not even cited any case from this Court or other courts of appeal which purport to be in conflict,[3/] review of these findings is not justified.

3/ Armour cites no decisions of this Court or of any sister circuits which are in conflict with the result below, and respondents are unaware of any lower court decisions holding that, as a matter of law, the scores of black employees such as those injured by the defendant's practices are not sufficiently numerous to warrant class treatment. Finding no conflict with other circuits, petitioner cites a purported

(Footnote 3/ cont'd)

Armour also asks this Court to adopt a rule of law stating that an employer's consistent pattern of retaliation against complaining black employees may never be challenged in a class action, even where, as here, the lower courts find that the employer adopted a "pervasive" and "consistent" practice of harassing every black employee who complained of discrimination. (See A. 189, 270) However, as noted by the courts below, there is no precedent for arbitrarily forbidding class treatment of such common issues of fact and law pursuant to the provisions of Rule 23.

3/ (cont'd) conflict with an earlier decision in the same circuit. However, the lower court specifically explained why Kelley v. Norfolk & Western Ry., 584 F.2d 34 (4th Cir. 1978), was inopposite (See A. 277-79). Review by this Court is unwarranted merely to assist the court of appeals in harmonizing two of its own decisions.

The dictum in Patterson v. General Motors Corp., 631 F.2d 476 (7th Cir. 1980) is not in conflict with the decisions below. Patterson affirmed a district court's denial of class certification since "plaintiff's action [met] none of the requirements of Rule 23(a)." 631 F.2d at 482 (emphasis in original). Indeed, the Patterson plaintiff complained "solely" of his "personal grievances," and he never "indicated that any other employee has ever been discriminated against in the same way or that there is the likelihood of such a future class ever existing." Id. In summary, the Patterson plaintiff had failed to meet any of the Rule 23(a) requirements of demonstrating impracticality of joinder, typicality, commonality, and adequacy of representation. Id. at 480-81. Such factual distinctions between

Patterson and the case at hand would render review of such a purported "conflict" meaningless.

Finally, Armour contends that the lower courts erred in utilizing Bennett's EEOC charge to determine the starting point of class liability, despite the fact that Bennett's charge raised all the class issues and was the earliest of the various EEOC charges. However, Armour failed to raise this issue in either the district court or in either of its two appeals to the court of appeals. Indeed, this issue first appeared in Armour's Petition for Rehearing in the Court of Appeals after the second appeal. Review should therefore be denied as no lower court has had the opportunity to even consider Armour's contention.

In any event, the approach followed here is consistent with

Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975), which reaffirmed the principle that plaintiff class members seeking back pay may rely on the EEOC charge of another plaintiff or class member, and by the standard practice in the circuits holding that Title VII's exhaustion requirement is satisfied if the EEOC charge on which the class action is based raises issues "like or related" to those actually litigated. See, e.g., Sanchez v. Standard Brands, 431 F.2d 455 (5th Cir. 1970); EEOC v. General Electric, 532 F.2d 339 (4th Cir. 1976). The district court found that Bennett's charge clearly raised such issues. (A. 110, 169-70) As the petitioner has cited no conflict among the circuits in approaches to this matter, review is not warranted.

Armour's argument that the lower courts here failed to follow General

Telephone Co. of the Southwest v. Falcon, 457 U.S. 147 (1982), ignores the extensive discussion of Falcon in the opinions of both courts below. (A. 166-69; 270-75) Indeed the court of appeals expressly relied on Falcon in excluding applicants from the class.

Armour also makes errors of fact when it argues that Bennett may not represent her fellow employees. The lower courts found that Bennett was an employee who was denied appointment or promotion to a permanent job and retaliatorily discharged when she complained. The lower courts concluded that she, as well as Holsey, Drakeford, Frazier, Harvey, Hill and Edwards were together appropriate class representatives and together satisfied the Rule 23 representational requirements. (A. 276-77)

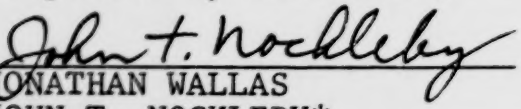
Determining who may appropriately represent a class of black employees requires delving into the particular facts of the putative representatives' claims. Here the lower courts properly exercised their discretion in a routine application of Falcon. The approach followed below is consistent with Falcon and sister circuits, and this court need not waste its time repeating the highly fact-specific inquiry already scrupulously undertaken by these lower courts.

Conclusion

The petition for a writ of certiorari should be denied.

This 12th day of February, 1985.

Respectfully submitted,



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